

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, <i>et al.</i> ,	)	
	)	
<i>Plaintiffs,</i>	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., <i>et al.</i> ,	)	
	)	
<i>Defendants.</i>	)	

**POULTRY DEFENDANTS' JOINT MOTION IN LIMINE  
TO PRECLUDE OPINION TESTIMONY BY NON-RETAINED EXPERTS  
AND INTEGRATED BRIEF IN SUPPORT**

Defendants Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Poultry, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., George's, Inc., George's Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, Simmons Foods, Inc., Cal-Maine Foods, Inc., and Cal-Maine Farms, Inc. (the "Poultry Defendants") respectfully request that the Court preclude the admission of opinion testimony offered by certain non-retained experts identified by Plaintiffs. In support of their motion, the Poultry Defendants submit the following brief.

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## **I. INTRODUCTION**

The Poultry Defendants anticipate that during the trial of this matter certain witnesses identified by Plaintiffs as non-retained experts will offer testimony that does not meet the standards of Federal Rule of Evidence 701, which applies to lay testimony, or Federal Rule of Evidence 702, which governs the admissibility of expert testimony. Plaintiffs have identified professors employed by the University of Arkansas and Purdue University and state employees as non-retained experts. In their depositions, each of these witnesses offered opinion testimony which should be classified as expert testimony under Federal Rule of Evidence 702. This testimony, however, does not satisfy the requirement of Rule 702 that expert opinion testimony be supported by sufficient facts and data and also fit “the facts of the case” at hand. Further, Plaintiffs have not supplied the foundation necessary to satisfy Rule 702’s requirement that an expert must be qualified through knowledge, skill, experience, training, or education. Finally, testimony of these university professors and a state employee is cumulative and should not be admitted, as is provided in Federal Rule of Evidence 403. The Court should enter an order precluding such testimony during the trial of this matter.

## **II. TESTIMONY AT ISSUE**

### **A. Dr. Indrajeet Chaubey**

Plaintiffs identified Dr. Indrajeet Chaubey, a professor at Purdue University, as a non-retained expert who may testify at the trial of this matter. Dr. Chaubey was deposed on January 27, 2009, and March 2, 2009, and offered opinions on a number of topics throughout his testimony, including the following:

1. Distance poultry litter is transported from a poultry barn prior to land application, Exh. 1 (Chaubey Depo.) at 35:2-14;

2. Timing of land application of poultry litter, *id.* at 35:21–36:2;
3. Timing of phosphorus transport from fields to water bodies in the IRW, *id.* at 46:1–11;
4. Behavior of phosphorus in water at different locations in the IRW, *id.* at 69:3–10;
5. Transport of nutrients in streams, *id.* at 69:15–70:1; 150:7–19;
6. Effects of cessation of land application in the IRW on loading of nutrients to water, *id.* at 70:2–71:22;
7. Contribution of phosphorus from land application of poultry litter to overall phosphorus loads in the IRW, *id.* at 74:14–75:13;
8. Accuracy of statements in a published article not authored by Dr. Chaubey regarding human health hazards and eutrophication that can result from excessive concentration of pollutants, *id.* at 81:4–82:18;
9. Sources of phosphorus in the Arkansas portion of the Illinois River Development Area based on SWAT modeling, *id.* at 92:5–94:3;
10. Form of bacteria in transport, *id.* at 104:21–105:2;
11. Whether land application of poultry litter in excess of agronomic needs is an appropriate use of poultry litter, *id.* at 109:7–13;
12. Sustainability effectiveness of buffer strips, *id.* at 125:2–20; 131:14–21; 215:23 – 216:23;
13. Whether cattle are contributors of phosphorus, *id.* at 128:1–130:15;
14. Whether poultry production practice of land application of poultry litter is substantial contributor of phosphorus to overall phosphorus loads in the IRW, *id.* at 130:16–131:13;
15. Behavior of land-applied poultry litter from different integrators' birds, *id.* at 165:14–166:2;
16. Correlation between high soil test phosphorus levels and rates of poultry litter application, *id.* at 175:17–176:8;
17. Effect of Eucha and Arkansas phosphorus indices on risks to water quality from land-applied poultry litter, *id.* at 180:10–181:10, 181:22–182:8;

18. Existence of locations in the IRW where agronomic need may exist but poultry litter should not be land applied, *id.* at 185:1–186:1;
19. Existence of natural land surfaces in the IRW that would never generate runoff, *id.* at 186:2–12;
20. Whether data and models indicate non-point source pollution as a major contributor to phosphorus within the streams and rivers of the IRW, *id.* at 193:1-16;
21. Whether phosphorus loading to Lake Tenkiller will increase in the future if land application continues at current rates, *id.* at 196:15–197:5; and
22. Effect of cessation of land application of poultry litter on continued phosphorus loading to the waters of the IRW, *id.* at 197:6-25.

**B. Dr. Tommy Daniel**

Plaintiffs identified Dr. Tommy Daniel, a professor at the University of Arkansas, as a non-retained expert who may testify at the trial of this matter. Dr. Daniel was deposed on November 26, 2007, and offered opinions regarding a number of topics throughout his testimony, including the following:

1. Nitrate leaching into the groundwater, non-point source phosphorus runoff into surface water bodies, and release of microorganisms, Exh. 2 (Daniel Depo.) at 46:11–47:2;
2. Possibility of runoff of dissolved phosphorus from fields receiving poultry litter even when BMPs are utilized, *id.* at 52:8-16;
3. Sources for non-point source pollution, *id.* at 82:24–83:4;
4. Possibility of trihalomethane formation during chlorination of drinking water, *id.* at 88:6-15;
5. Economic impacts of land application of manure, *id.* at 90:19-24;
6. Potential effects of land application of poultry litter, *id.* at 93:18-24; and
7. Potential impact of increased phosphorus levels in runoff on the eutrophication process, *id.* at 94:5-10.



### **C. Dr. Brian Haggard**

Plaintiffs identified Dr. Brian Haggard, a professor at the University of Arkansas, as a non-retained expert who may testify at the trial of this matter. Dr. Haggard was deposed on April 16, 2009, and offered opinions regarding a number of topics throughout his testimony, including the following:

1. Whether phosphorus buildup in soil can occur simply as a result of over application of poultry litter, Exh. 3 (Haggard Depo.), at 49:19–50:11;
2. Role of storm runoff in phosphorus transport and contribution of diffuse phosphorus pollution to freshwater systems, *id.* at 59:20–60:8; and
3. Need to carefully manage poultry litter due to impact on stream nutrient concentrations of small losses of nutrients, *id.* at 73:2-16.

### **D. Mr. Mark Derichsweiler**

Plaintiffs identified Mark Derichsweiler, an employee of the Oklahoma Department of Environmental Quality, as a non-retained expert who may testify at the trial of this matter. Mr. Derichsweiler was deposed on August 8, 2008, and offered opinions regarding a number of topics throughout his testimony, including the following:

1. Whether the land application of poultry litter in the IRW has led to the runoff and release of large quantities of phosphorus or other alleged hazardous substances, pollutants, and contaminants from the fields where the litter was applied to waters in the IRW, Exh. 4 (Derichsweiler 8/8/08 Depo.), at 25:11- 25;
2. Whether the practice of land applying poultry litter has caused the release of significant quantities of bacteria into any waters in the IRW, *id.* at 33:2-8;
3. Levels of phosphorus compounds and bacteria in IRW waters, *id.* at 41:22–42:4, 48:11-14, 23-24;
4. Relative contribution of poultry litter to the loading of phosphorus to Lake Tenkiller and in IRW streams, *id.* at 56:13-22, 60:9-10, 57:5-8, 68:2-9;
5. Cause of eutrophication of Lake Tenkiller, *id.* at 67:20–68:1; and
6. The state of eutrophication of Lake Tenkiller is accelerated, *id.* at 68:25–69:3.

The lists of opinion testimony in this section are not meant to be exhaustive. Plaintiffs' non-retained experts offer such extensive opinions that a comprehensive description is not practical. The lists above are meant to provide the Court with examples of the type and range of opinion testimony offered by the non-retained experts.

### **III. ARGUMENT AND LEGAL AUTHORITY**

#### **A. Testimony Based on Scientific, Technical, or Other Specialized Knowledge Cannot be Admitted Under Federal Rule of Evidence 701**

Non-retained experts such as these are not permitted to offer opinion testimony through Federal Rule of Evidence 701. Rule 701 provides that opinion testimony offered by a lay witness may not be "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." This provision was added to Rule 701 in 2000 to "eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Advisory Committee Note to Federal Rule of Evidence 701. "The primary purpose of Rule 701 is to allow nonexpert witnesses to give opinion testimony when, as a matter of practical necessity, events which they have personally observed cannot otherwise be fully presented to the court or the jury." *Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 846 (10th Cir. 1979) (citing Weinstein's Evidence, ¶ 701(02) (1977)). "[H]owever, this rule does not permit a lay witness to express an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness." *Id.* It is clear that where opinion testimony "results from a process of reasoning which can be mastered only by specialists in the field," rather than from "reasoning familiar in everyday life," such opinion testimony cannot be admitted under Rule 701. Advisory Committee Note to Federal Rule of Evidence 701.

The Second Circuit's decision in *Bank of China v. NBM LLC*, 359 F.3d 171 (2d. Cir. 2004) provides an example of how courts interpret and apply Rule 701. In *Bank of China*, a bank employee was assigned to investigate transactions between the defendants. The bank employee occupied a senior role at the bank and had years of experience in international banking. The Second Circuit found that the defendant should be permitted to testify under Rule 701, provided that his testimony was "based on the investigation and reflected his investigatory findings and conclusions, and was not rooted exclusively in his expertise in international banking." 359 F.3d at 181. "However, to the extent [the] testimony was not a product of his investigation, but rather reflected specialized knowledge he has because of his extensive experience in international banking, its admission pursuant to Rule 701 was error." *Id.* at 182.

The opinion testimony offered by Plaintiffs' non-retained experts is most certainly based on scientific, technical, or other specialized knowledge. As set out above, Drs. Chaubey, Haggard, and Daniel are university professors whose opinions are presumably based upon scientific studies conducted as part of their academic work, not simply upon reasoning familiar in everyday life. *See supra* p. 1-4 & Exhs. 1-3.

Mr. Derichsweiler's opinions were generated as a result of his professional and educational background as an engineer, which affords him an ability to understand technical and scientific issues in a way that a lay person could not. Exh. 4 at 8:24-9:2 (Derichsweiler possesses bachelor of science degree in civil engineering and a masters degree in regional and city planning); *id.* at 9:3-6 (Derichsweiler is a registered professional engineer in the State of Oklahoma); *id.* at 10:6-14 (Derichsweiler's section of DEQ is responsible for compiling the results of water quality monitoring and the assessments of those data as compared to water quality standards to identify impaired waters for the 303(d) list sent biannually to EPA and for

conducting TMDL studies for impaired waters); *see also* Exh. 5 (Derichsweiler 5/23/08 Depo.) 30:3-10 (also works with planning issues and wasteload allocations); *id.* at 30:11-15 (coordinates preparation of Oklahoma's semi-annual report to EPA, the Integrated Water Quality Assessment Report, which combines reports required under Sections 303(d) and 305(b) of the Clean Water Act); *id.* at 30:20-24 (coordinates development of the Storm Water Permitting Program and revises permits); *id.* at 31:14-32:6 (has worked with ODEQ since the agency was formed in 1998 or 1999 and worked with Oklahoma Department of Health prior to that, starting in 1976); *id.* at 34:12-38:21 (entire professional career has involved working with water quality issues). Therefore, Mr. Derichsweiler's opinions are based upon specialized knowledge and training. This is exactly the type of opinion testimony which may not be proffered under Rule 701.

Plaintiffs have designated the deposition testimony of these witnesses for use at trial and have indicated that these gentlemen will not appear live but rather will "appear" to offer opinion testimony through the generalized opinions and statements elicited by Plaintiffs' counsel during their depositions. Because such opinions are based upon specialized or technical knowledge not in the possession of the average layperson, this Court should issue an order precluding the presentation of such testimony under Rule 701, requiring them instead to satisfy the requirements for expert testimony under Rule 702, as discussed below.

**B. Plaintiffs Have Not Established the Required Factual Foundation Required By Rule 702 or that Their Non-Retained Experts Possess the Expertise Necessary to Support the Opinion Testimony They Offer**

Plaintiffs have designated deposition testimony for Drs. Chaubey, Haggard, and Daniel. If Plaintiffs intend to use the depositions of these non-retained experts to present their testimony rather than calling them live at trial, they will be limited to the foundational questions asked in the depositions themselves. However, in those depositions, Plaintiffs fail to lay the appropriate foundation regarding the qualifications of these witnesses to offer the opinion testimony at issue

and further fail to develop the factual basis for such opinions. Thus, the opinions offered by Plaintiffs' non-retained experts in their depositions are *ipse dixit* opinions which do not meet the standards set forth in Federal Rule of Evidence 702.

1. The Deposition Record Does Not Demonstrate the Requisite Expertise Required under Rule 702 Related to the Opinions Offered

Rule 702 allows a "witness qualified as an expert by knowledge, skill, experience, training, or education" to testify in the form of an opinion on topics relating to that knowledge, skill, experience, training, or education. Such qualification must be established by questioning the witness about his background. Because Plaintiffs appear to present testimony of these non-retained witnesses through their depositions (as opposed to calling them live at trial), the record available to the Court as to the qualifications of these non-retained experts to offer the specific opinions being offered is limited to the record developed by the Plaintiffs during the deposition. Plaintiffs simply did not develop a deposition record to the extent necessary to sufficiently demonstrate that their non-retained experts are qualified to offer the opinion testimony at issue. Therefore, the opinion testimony does not meet the requirements of Rule 702 and must be excluded.

a. Dr. Chaubey

Plaintiffs treat the area of Dr. Chaubey's expert qualifications, education, and professional background very lightly in his deposition. Although they attached Dr. Chaubey's curriculum vitae as an exhibit to the deposition,<sup>1</sup> they failed to question Dr. Chaubey fully about his background and experience. Instead, with respect to certain aspects of Dr. Chaubey's qualifications, Plaintiffs' counsel simply asks him to simply describe any information that is omitted from the curriculum vitae. *See* Exh. 1 at 14:9-16. Information contained in a curriculum

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<sup>1</sup> The curriculum vitae is actually several pages of biographical information downloaded from the Purdue University website. Exh. 1, at 13:24-14:4.

vitae that is not the subject of questioning, like information contained in any other writing, is hearsay. *See* Federal Rule of Evidence 801 (“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”). Hearsay is inadmissible. Federal Rule of Evidence 802. Thus, any information contained in Dr. Chaubey’s curriculum vitae about which he was not questioned during his deposition is inadmissible and cannot be used to establish the foundation required by Rule 702 - that is that Dr. Chaubey is qualified to offer the expert opinion testimony at issue.

Although Dr. Chaubey’s educational history and work experience was the subject of questioning during his deposition (*see* Exh. 1, at 14:19-23, 15:2-5, 15:22-16:1, 15:16-21, 16:9-13, 21:8-22:17, and 23:3-24:4), testimony about his honors and awards and professional experience is sparse. For example, Dr. Chaubey described only one award he possesses, the New Holland Young Researcher Award. *Id.* at 16:20-17:8. The only professional experience about which Dr. Chaubey testified, other than his actual employment history, is his involvement in some committees at Purdue University. *Id.* at 17:12-21. Dr. Chaubey does not describe in any detail his publications, presentations, seminars, research reports, and other similar documents; instead, two documents identifying his publications were attached to his deposition as exhibits. *See id.* at 18:17-19:10. Dr. Chaubey generally has experience in research related to land application of poultry litter, water quality, constituent transport in small controlled plots, best management practices, hydrologic and water quality models, and mass balance work. *Id.* at 21:18-22:3, 22:12-17, 23:6-10, 25:1-11, 217:21-219:22.

In his deposition, Dr. Chaubey offered opinions on an amazingly broad list of topics ranging from sources of phosphorus to human health hazards. *See supra*, Section II.A.



Unfortunately, Plaintiffs, through their questioning, do not establish Dr. Chaubey's qualifications to offer such wide-ranging opinions.

Dr. Chaubey's opinions regarding the transport of constituents of poultry litter relate to his research experience dealing with the transport of such constituents in "small controlled plots." Exh. 1 at 21:18-25. However, such research does not provide him with the qualifications to offer opinions regarding the transport of poultry litter constituents across an actual watershed covering more than a million acres, such as the IRW. Dr. Chaubey has no stated experience or background in the study of human health hazards; in fact, he testified that he is not a toxicologist (*id.* at 236:17-18) or a medical doctor (*id.* at 237:7-8). Yet, he offers opinions regarding human health hazards which may result from the land application of poultry litter. Dr. Chaubey also offers multiple opinions regarding buffer strips. One of those opinions relates to the reduction in the effectiveness of buffer strips that results from animal activity in the buffer strip. *Id.* at 215:23-216:23. However, he testified that he has only personally seen two such buffer strips in the IRW. *Id.* at 216:24-217:2. Many of Dr. Chaubey's opinions relate to aspects of limnology, microbiology, agronomy, agricultural economics, and fluvial geomorphology. However, Dr. Chaubey testified that he is not a microbiologist (*id.* at 236:15-16), an agricultural economist (*id.* at 237:3-4), or an agronomist (*id.* at 237:9-10). Although his work as a hydrologist involves work with fluvial geomorphology and limnology, Dr. Chaubey did not testify that he considers himself a limnologist or a fluvial geomorphologist. *Id.* at 236:6-14, 237:17-19.

Plaintiffs have not satisfied their burden under Rule 702 to elicit deposition testimony sufficient to demonstrate that Dr. Chaubey has the knowledge, skill, experience, training, or education which qualifies him to render many of the opinions described herein. Further, testimony by Dr. Chaubey actually reveals that he does not have the required expertise. This

Court should enter an order precluding the admission of opinion deposition testimony by Dr. Chaubey which is not supported by the necessary knowledge, skill, experience, training, or education. If Plaintiffs choose to bring Dr. Chaubey to testify live at trial, they must, of course, establish that he possesses requisite training and qualifications to support expert opinion in these areas before offering his opinions.

b. Drs. Daniel and Haggard

Plaintiffs established that Dr. Daniel is currently a tenured professor with the Crop, Soil, and Environmental Science Department at the University of Arkansas. Exh. 2 at 8:7-11, 8:14-15. Dr. Daniel holds a bachelors degree in agronomy, a masters degree in horticulture, and a Ph.D in soil science with a minor in water chemistry. *Id.* at 9:1-7. As was the case with Dr. Chaubey, Plaintiffs did not question Dr. Daniel in his deposition regarding his publications. Instead, Plaintiffs simply attached a list of publications as an exhibit to Dr. Daniel's deposition (*id.* at 9:9-24), which is not admissible as it constitutes hearsay. Although Plaintiffs explore Dr. Daniel's employment history and research activities in the academic realm, which involve the study of water quality and runoff (*id.* at 10:15-19), evaluation of edge-of-field runoff (*id.* at 23:10-14), and quantification of background levels and the effects of haying and grazing (*id.* at 23:14-19), many of the opinions which Plaintiffs solicit from Dr. Daniel do not relate to Dr. Daniel's experience.<sup>2</sup>

Dr. Daniel's opinions cover topics ranging from manure management to trihalomethane formation at drinking water plants to agricultural economics. *See supra*, Section II.B. Plaintiffs

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<sup>2</sup> Plaintiffs attached a "biosketch" downloaded from the University of Arkansas website as an exhibit to Dr. Daniel's deposition. Exh. 2, 9:8-15. However, it was not established that Dr. Daniel considers this to be a curriculum vitae. Regardless of whether the document constitutes Dr. Daniel's curriculum vitae, to the extent Plaintiffs failed to question Dr. Daniel regarding the information in the document, such information is hearsay and cannot be admitted as evidence in this matter pursuant to F.R.E. 801 and 802.



did not create a deposition record to substantiate Dr. Daniel's qualifications and expertise to offer opinions on such a broad range of issues.

Plaintiffs' exploration of Dr. Haggard's experience and background is likewise insufficient to support many of the opinions which they solicit from him. In the deposition, Plaintiffs established that Dr. Haggard possesses a bachelors degree in life sciences, a masters degree in environmental soil and water science, and a doctorate in biosystems engineering.<sup>3</sup> Exh. 3 at 10:11-18, 11:3-5. He has worked for government entities, as well as in the academic world. He worked as a hydrologist for the USGS, where his responsibilities included water quality data analysis. *Id.* at 12:13-22. He worked as a research hydrologist for the USDA where he researched water quality issues in northwest Arkansas through scientific studies and evaluation of land use on chemical concentrations in streams. *Id.* at 13:5-22. Also at the USDA, he did some plot studies and sampling in streams for nitrogen and phosphorus concentrations. *Id.* at 14:23-15:5. Dr. Haggard entered academia as an associate professor at the University of Arkansas and is now the director at the Arkansas Water Resources Center. *Id.* at 15:14-23. Plaintiffs fail to fully develop the areas of research with which Dr. Haggard has experience, whether through his educational studies, government career, or academic career.

Plaintiffs asked Dr. Haggard to opine in his deposition on topics ranging from the transport of metals through runoff water to phosphorus concentrations in soil. *See supra*, Section II.C. However, Plaintiffs failed to develop deposition testimony sufficient to establish Dr.

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<sup>3</sup> Plaintiffs attached Dr. Haggard's curriculum vitae as an exhibit to his deposition and questioned him about some items that appear in the curriculum vitae. *See* Exh. 3 at 10:2-6. However, to the extent Plaintiffs failed to question Dr. Haggard regarding the information in the document, such information is hearsay and cannot be admitted as evidence in this matter pursuant to F.R.E. 801 and 802.

Haggard's educational or professional background that supports his qualifications to offer these opinions.

It is not sufficient that Dr. Daniel or Dr. Haggard may possess the knowledge required to offer an opinion regarding a particular topic upon which Plaintiffs questioned them. Rather, Plaintiffs bear the burden under Rule 702 of demonstrating to this Court that their experts are indeed qualified by knowledge, skill, experience, training, or education to offer the opinions they seek to present through the designated deposition testimony. Plaintiffs simply have not met this burden through the deposition testimony of Drs. Haggard and Daniel. If Plaintiffs choose to bring either Dr. Daniel or Dr. Haggard to testify live at trial, they must, of course, establish that these witnesses possess requisite training and qualifications to support expert opinion in these areas before offering their opinions.

2. The Deposition Record Does Not Establish a Sufficient Factual Foundation for the Opinions Elicited from these Non-Retained Experts

Rule 702 requires that opinion testimony offered by an expert must be based upon sufficient facts or data and must be the result of reliable principles and methods. In the depositions of Plaintiffs' non-retained experts, Plaintiffs did not develop the factual basis for many of the opinions offered. Instead, Plaintiffs often simply asked the witness whether he still agreed with selective statements excerpted by Plaintiffs' counsel from previously published articles. Without some description of the analysis undertaken to reach those opinions at the time they were originally proffered, the opinions are not tied to any, much less sufficient, facts or data, which is required for the admission of opinion testimony under Rule 702.

As an example, Plaintiffs presented Dr. Daniel with a paper he published in May/June of 1995 in the Journal of Soil and Water Conservation and asked him whether opinions expressed in the article are still valid today and what he meant by certain statements included in the article.

*See, e.g.*, Exh. 2 at 45:9-47:1, 48:6-18, 49:21-50:10, and 52:8-53:3. However, Plaintiffs asked Dr. Daniel no questions regarding the methodology he used in conducting the research underlying the paper or the factual basis for the conclusions expressed in the paper. The instances in which Plaintiffs used this questioning technique are far too numerous to set forth in detail in this motion; however, similar questions were posed to Dr. Daniel throughout his entire deposition, as well as to Drs. Haggard and Chaubey throughout their depositions. *See, e.g.*, Exh. 1 at 39:24-40:23; Exh. 3 at 49:19-50:1 (asking Dr. Haggard whether phosphorus buildup in soil can occur simply as a result of overapplication of poultry litter without inquiring as to the factual basis for his opinion).

Additionally, Plaintiffs repeatedly asked these non-retained experts to offer new opinions without eliciting the factual basis for the opinion. As one example, Plaintiffs asked Dr. Chaubey if he has an opinion as to whether “nutrients are eventually delivered to downstream water bodies, such as lakes and reservoirs, once they reach the stream” and then asked him to describe the opinion. Exh. 1 at 69:15-22. Dr. Chaubey simply responded that “[o]nce phosphorus is delivered in the streams, it eventually makes its way downstream.” *Id.* at 69:25-70:1. This opinion is not contained in Dr. Chaubey’s previously published works, and Plaintiffs did not request, and Dr. Chaubey did not provide, a description of the factual basis for his opinion. Again, the instances in which Plaintiffs used this questioning technique with not only Dr. Chaubey, but also with Dr. Haggard and Dr. Daniel, are too numerous to recount in detail here, but such questions were continually posed to each of these non-retained experts. *See, e.g.*, Exh. 3 at 34:17-36:18 (asking Dr. Haggard, without requesting the factual basis for his opinions, whether phosphorus concentrations and metals reach streams and waters in a typical situation with the topography used in a particular study); Exh. 2, 103:11-17 (asking Dr. Daniel if a high

soil test phosphorous in a watershed raises a red flag as to the potential of risk to the environmental water bodies).

To the extent that Plaintiffs have designated opinion testimony from the non-retained experts at issue without laying a foundation as to the basis of those opinions and the methods used to develop those opinions as required by Rule 702, Defendants request that the Court enter an order precluding the admission of such testimony.

**C. The Deposition Record Does Not Establish that the Opinions of These Non-retained Experts are Sufficiently Tied to the Facts of This Case as Required by Federal Rule of Evidence 702**

Many of the expert opinions designated by Plaintiffs from the depositions of these non-retained experts do not satisfy the requirement of Rule 702 that opinion testimony must be tied to the "facts of the case." Although the non-retained experts at issue have some familiarity with the IRW, the generalized opinions elicited from them during their depositions are not based upon facts specifically related to this case.

A court is not required to "admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *City of Wichita, Kansas v. Trustees of the Apco Oil Corporation Liquidating Trust*, 306 F.Supp.2d 1040, 1110 (D. Kansas 2003) (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997)); *see also Attorney General of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 780 (10th Cir. 2009) (Rule 702 excludes an expert where the testimony leaves "too great an analytical gap between the data and the opinion proffered" (quotations omitted)). In one case, the Supreme Court has held that "[t]he studies were so dissimilar to the facts presented in this litigation that it was not an abuse of discretion of the District Court to have rejected the experts' reliance on them." *Joiner*, 522 U.S. at 145.

Courts routinely exclude expert testimony where the expert is not familiar with the facts and circumstances of the specific litigation. *See, e.g., Wurtzel v. Starbucks Coffee Company*, 257

F. Supp. 2d 520, 526 (E.D.N.Y. 2003); *Brooks v. Outboard Marine Corp.*, 234 F.3d 89 (2d. Cir. 2000)

Plaintiffs' non-retained experts Drs. Chaubey, Haggard, and Daniel have performed tests and studies relating to the IRW generally. However, their tests involve different time frames and different portions of the IRW than the work performed in this case by Plaintiffs' retained experts. Dr. Chaubey testified that he has not been asked by the Plaintiffs or anyone else to form opinions specific to this case. Exh. 1 at 13:18-22. Dr. Chaubey's work in the IRW occurred during different, and sometimes much earlier, periods of time than the sampling and analysis performed by retained experts in this case. *Id.* at 25:21-23 (time frame of Dr. Chaubey's work in the IRW was during the early 1990's and again starting in 2000); *id.* at 254:21-255:3 (Dr. Chaubey's papers regarding vegetative buffer strips were published in 1994 or 1995). Although Dr. Chaubey has conducted some limited studies relating to the IRW, much of his work has focused on subwatersheds contained within the IRW, rather than the entire million acre watershed. *Id.* at 19:13-20:25 (Dr. Chaubey's current work in the IRW focuses only on a portion of the watershed located in Arkansas); *id.* at 134:16-24 (Dr. Chaubey has conducted experiments in the Savoy Experimental Watershed, near Fayetteville). Dr. Chaubey himself testified that he intends to offer opinions not specific to the entire IRW, but rather about watersheds that may be in similar physiographic regions with similar hydrologic and geologic soil characteristics. *Id.* at 244:19-245:6. However, Dr. Chaubey acknowledges that if conditions such as climate, land use, and land management practices are not the same, his general conclusions may not be applicable. *Id.* at 246:24-248:22.

Dr. Daniel stated that his opinions regarding the extent to which poultry litter has contributed to the eutrophication of Lake Tenkiller are not specific to the IRW, but instead focus

on such an effect in a general context. *See* Exh. 2, 164:13-24. Although Dr. Daniel testified about the existence of trihalomethanes in the IRW, *id.* at 88:6-15, he acknowledged that his statements were generalized and that he is not aware of any work done by himself or anyone else that would establish the presence of trihalomethanes in drinking water and the Illinois River as a result of poultry litter. *Id.* at 164:25–165:9. Articles containing previously published opinions about which Dr. Daniel was questioned during his deposition do not relate specifically to the IRW or to the facts of this case. One such article was published in 1995 and is simply a general discussion of environmentally sound options for poultry litter management, rather than being based on any data specific to the IRW, much less data specific to this case. *Id.* Exh. 4. Other articles included discussion of phosphorus runoff from agricultural land in the context of a wide geographical area, including the Great Lakes, Chesapeake and Delaware Bays, Lake Okeechobee, and the Everglades (*id.* Exh. 7), focused on a study conducted at the Main Agricultural Experiment Station of the University of Arkansas (*id.* Exh. 8), and examined nine geographic regions located solely in Arkansas (*id.* Exh. 13).<sup>4</sup> Each of the articles about which Dr. Daniel was questioned were published prior to the filing of this lawsuit and none involved examination of data relating to the IRW as a whole.

Dr. Haggard's deposition reflects that he has not read Plaintiffs' complaint and has not conducted any research specific to this case. *See* Exh. 3 at 6:6-8. Furthermore, counsel for Dr. Haggard made clear at the beginning of the deposition at issue that Dr. Haggard was not offering expert opinions regarding this lawsuit. *Id.* at 5:10-7:18.<sup>5</sup> As was the case with Dr. Daniel,

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<sup>4</sup> The Arkansas portion of the IRW was included in the geographic regions studied by Dr. Daniel. However, none of the regions encompassed the Oklahoma portion of the IRW, which affects the article's application to this case because the Oklahoma portion comprises approximately half of the entire watershed.

<sup>5</sup> The complete text of the record made by counsel for Dr. Haggard is as follows:



articles containing previously published opinions about which Dr. Haggard was questioned during his deposition do not relate specifically to the IRW as a whole or to the facts of this case.

One article about which Dr. Haggard was questioned focuses on a study conducted at the

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Thank you, Mr. Garren. I appreciate the opportunity to do that at the outset of the deposition to try to minimize any interruptions with your interrogation. I'm here today on behalf of Dr. Haggard, who is here as a fact witness in response to a subpoena that you issued. Even though the subpoena did not compel the production of any records from Mr. Haggard, he did bring his resume at your request. He is prepared to answer factual questions regarding his resume, his prior and current research and publications and for facts over which he has direct knowledge.

Dr. Haggard is not here today as an expert witness. The Federal Rules of Civil Procedure make clear that he's not legally obligated to render his professional opinions or extrapolate from his research and publications to respond to hypothetical questions or questions pertaining to the ultimate issues in this case. He has not been retained as an expert in this case by either party, not disclosed as an expert witness in any discovery. Dr. Haggard has not read the complaint or conducted any research on the ultimate issues in dispute in this case. No scientific basis exists for Dr. Haggard to render scientific opinions on the ultimate issues in this case. The parties' respective experts can interpret Dr. Haggard's research and publications with regard to their expert opinions.

Federal Rule of Civil Procedure 45(c)(3)(b)(ii) makes clear that Dr. Haggard can't be compelled to render his professional opinion as an expert for the parties in this case. As stated in the advisory committee note to Rule 45(c)(3)(b)(ii), quote, the compulsion to testify can be regarded as the taking of intellectual property. The Rule establishes the right of such persons to withhold their expertise, at least unless the parties seeking it makes the kind of showing required for conditional denial of a motion to quash as provided in the final paragraph of 45(c)(b)(iii). That requirement is the same as that necessary to secure work product under Rule 26(b)(3) and gives assurances of reasonable compensations, closed quote.

For these reasons and based on the caselaw cited in the advisory committee note, Dr. Haggard objects to any questions or lines of questioning seeking his professional opinion on the issues in this case under rule 45(c)(3)(b)(ii) and hereby moves to limit the scope of any inquiry to his knowledge of the facts relevant to this case rather than provide opinion testimony or his previously formed opinions as expressed in his publications.

If plaintiff's counsel fails to comply with the requirements of the Rule, Dr. Haggard moves to suspend the deposition to submit a motion to the U.S. District Court for the Western District of Arkansas.

Thank you, Mr. Garren.

University of Arkansas Agricultural Research and Extension Center, located in Fayetteville, Arkansas (*see id.* Exh. 2); another article focuses on a study conducted at the Savoy Experimental Watershed, located near Fayetteville, Arkansas, *see id.* Exh. 3. Yet another article focuses on data collected in the Beaver Lake Watershed. *See id.* Exh. 4. While two of these studies were conducted within the IRW, none of them encompass data relating to the IRW as a whole, which is the focus of this lawsuit. Additionally, two of the studies involved the creation of data through scientific experiments, rather than the collection of actual water quality data as has been conducted by Plaintiffs' retained experts in this lawsuit. Due to these dissimilarities, the data which underlie Dr. Haggard's opinions is not sufficiently tied to the facts of this case to pass muster under Rule 702.

Mr. Derichsweiler relies upon work performed by Dr. Dan Storm, Dynamic Solutions, Plaintiffs' retained experts, and the Clean Lakes study conducted by the Oklahoma Water Resources Board through Oklahoma State University. *See* Exh. 4 at 26:1-6, 26:9-18, 57:16-58:9, 70:21-71:2, 34:4-7, and 66:13-15. To the extent that Mr. Derichsweiler's opinions are based upon work performed by Dr. Dan Storm, Dynamic Solutions, and Plaintiffs' retained experts, they are cumulative and are addressed in Section III.C. below. To the extent Mr. Derichsweiler relies upon the Clean Lakes study, his opinions do not satisfy Rule 702. This study occurred in the 1990's, *id.* at 26:24-27:1, and there is no testimony supporting its relevance to current conditions, *id.* at 62:23-63:4. Because this study is not based on contemporaneous water quality data, it is not relevant to or based on the subject of this lawsuit.

As the foregoing discussion demonstrates, the opinions that Plaintiffs may attempt to elicit from these non-retained experts are not grounded in the facts and data of this case. These opinions were formed during different time periods and are based on non-representative data. As



Dr. Chaubey conceded, if conditions in the subwatersheds where he conducted his tests differ from conditions across the IRW, any conclusions reached cannot be applied to the IRW as a whole. Finally, many of the studies about which Plaintiffs' non-retained experts were questioned report the results of *experiments* conducted regarding poultry litter, rather than focusing on data collected under real conditions in the IRW. It is clear that the studies conducted by Plaintiffs' non-retained experts are dissimilar from the facts of this case, and, therefore, the Court should exclude any opinion testimony by such non-retained experts.

**D. Opinions Offered by Dr. Chaubey Which Were Not Disclosed Prior to this Litigation are Barred Under Federal Rule of Civil Procedure 26**

Several of Dr. Chaubey's opinions are improper on account of Plaintiffs' failure to detail them in a timely Rule 26 Report. Specifically, the designated portions of Dr. Chaubey's deposition include new opinions formed during and as part of this litigation which are not included in Dr. Chaubey's previously published articles. New opinions such as these, formed during the course of litigation, require an otherwise un-retained expert to supply a Rule 26 Report. Because Plaintiffs submitted no expert report for Dr. Chaubey, the designated portions of Dr. Chaubey's deposition which include new opinions represent untimely expert opinions and should be excluded by the Court.

Rule 26(a)(2) requires any expert who is "retained or specifically employed to provide expert testimony in the case" to proffer a Rule 26 report. Whether a report is required does not turn solely on whether the expert is being compensated. *See B.H. v. Gold Fields Mining Corporation*, 2007 WL 128224, at \*\*3-4 (N.D. Okla. January 11, 2007); *Brown v. Best Foods*, 169 F.R.D. 385, 388 n.3 (N. D. Ala. 1996). Indeed, Rule 26(a)(2) separately treats "retained" (*i.e.*, compensated) and "specifically employed" (*i.e.*, solicited, but not compensated) expert witnesses. Fed. R. Civ. P. 26(a)(2). Instead, whether a Rule 26 report is required turns on the

nature of the opinions being given, when and how they were formed, and the expert's relationship with the party or attorneys soliciting them. *See B.H.*, 2007 WL 128224, at 3-4 (citing authorities).<sup>6</sup> An un-retained expert may share opinions formed based on "pre-litigation observation" without providing a Rule 26 report. *See id.* (professor was a proper non-retained expert because he "formed his opinions in the normal course of his work" and has not "reached any opinion specifically in connection with this litigation."); *see also Sprague v. Liberty Mutual Insurance Co.*, 177 F.R.D. 78, 81 (1998) (setting out relevant considerations). But an expert going beyond that pre-litigation work and forming new opinions relevant to the litigation must provide a report sharing those opinions. *See Griffith v. N.E. Ill. Regional Commuter R.R. Corp.*, 233 F.R.D. 513 (N.D. Ill. 2006) (treating physician no longer an un-retained expert when he "opines as to causation, prognosis or future disability" where he "is going beyond his personal involvement in the facts of the case and giving an opinion formed because there is a lawsuit.").

Here, Dr. Chaubey's opinions were solicited specifically for this litigation by Plaintiffs. Dr. Chaubey is a colleague of Plaintiffs' retained expert Dr. Engel at Purdue University and reports directly to Dr. Engel. *See* Exh. 1 at 34:9-35:9, 204:16-24. As Defendants objected at the time, Plaintiffs' themselves took Dr. Chaubey's deposition to elicit trial-type testimony. *Id.* at 34:9-35:9. Prior to giving that deposition, Dr. Chaubey met for several hours with Plaintiffs'

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<sup>6</sup> *See Kirkham v. Societe Air France*, 236 F.R.D. 9, 12 (D.D.C. 2006) (witness's relationships with a party is relevant to whether the witness must supply a report); *Griffith v. N.E. Ill. Regional Commuter R.R. Corp.*, 233 F.R.D. 513 (N.D. Ill. 2006) (treating physician supplying causation testimony must supply expert report); *Thomas v. Consolidated Rail Corp.*, 169 F.R.D. 1, 1-2 (D. Mass. 1996) ("a treating physician who has formulated opinions going beyond what was necessary to provide appropriate care for the injured party steps into the shoes of a retained expert for purposes of Rule 26(a)(2)"); *Widhelm v. Wal-Mart Stores, Inc.*, 162 F.R.D. 591, 594 (D. Neb. 1995) (same); *Wreath v. United States*, 161 F.R.D. 448 (D. Kan. 1995) (same); *see also Musser v. Gentiva Health Servs.*, 356 F.3d 751, 758 n.3 (7th Cir. 2004) (noting but not resolving question whether alleged un-retained experts were obliged to produce expert reports); *Patel v. Gayes*, 984 F.2d 214, 218 (7th Cir. 1983) (same); *Osterhouse v. Glover*, 2006 WL 1388841, at \*\* (S.D. Ill. May 17, 2006) (same).

counsel to discuss his testimony. *Id.* at 200:9-216:16. And, Plaintiffs funded Dr. Chaubey's deposition expenses. *Id.* at 207:17-208:13.

During the course of that deposition, Dr. Chaubey was repeatedly asked to opine as to considerations relevant to the facts of this case, as distinct from opinions he clearly articulated prior to the litigation. In fact, each of the opinions described in Section II.A. above is a new or previously undisclosed opinion.

Dr. Chaubey's new opinions were not articulated independent of the litigation, but rather solicited by Plaintiffs and should have been set forth in a Rule 26 Report and are not proper "non-retained expert" testimony. It would be fundamentally unfair for Plaintiffs to be permitted to seek an expert opinion from such an individual without affording Defendants the protections of Rule 26. Therefore, any opinion of Dr. Chaubey's not firmly grounded in his pre-litigation work should be excluded.

#### **E. Testimony of Plaintiffs' Non-Retained Experts is Cumulative**

The opinion testimony which the Poultry Defendants anticipate Plaintiffs' non-retained experts will offer is duplicative of opinions advanced by Plaintiffs' retained experts. Federal Rule of Evidence 403 provides that evidence, even that which is relevant, may be excluded if its "probative value is substantially outweighed by . . . considerations of . . . needless presentation of cumulative evidence." In the interests of judicial economy, the Court should exclude non-retained expert testimony that simply repeats opinions offered by Plaintiffs' retained experts.

Mark Derichsweiler testified with respect to many of the opinions described above in Section II.D. that his opinion was based upon water quality studies conducted by Dr. Dan Storm under contract with Oklahoma State University and Dynamic Solutions under contract with the Oklahoma Department of Environmental Quality, as well as the Clean Lakes study conducted by the Oklahoma Water Resources Board through Oklahoma State University. *See* Exh. 4 at 26:1-6,

26:9-18, 57:16-58:9, 70:21-71:2. Mr. Derichsweiler stated that if he were to offer certain opinions at the trial of this matter, he would be conveying essentially the same conclusions reached by Dr. Storm or Dynamic Solutions' staff members. *Id.* at 31:3-8. Dr. Storm has been identified by Plaintiffs as a witness who may testify at the trial of this matter. *See* Exh. 6, April 1, 2008 Correspondence from L. Bullock to Defense Counsel.<sup>7</sup>

Mr. Derichsweiler testified that otherwise his opinions rely on the work of experts retained by the Oklahoma Attorney's General's office in this case. *See* Ex. 4 at 34:4-7, 66:13-15. Mr. Derichsweiler has reviewed copies of expert reports submitted in this action. *Id.* at 34:15-20. With respect to his opinion that poultry litter is the largest contributor of phosphorus loading to the IRW, Mr. Derichsweiler testified that he is relying on his review of the work of others, rather than on an independent engineering evaluation of the degree to which poultry litter is a contributor of phosphorus to the waters in the IRW. *Id.* at 62:17-22. Dr. Bernard Engel offers a similar opinion stating that "[p]oultry production within the Illinois River Watershed is currently responsible for more than 76% of [phosphorus] movement into the watershed." Exh. 10, Expert Report of Bernard Engel, 5/22/08, at 1. Dr. Engel further opines that "[a]verage annual P loads to water in the Illinois River Watershed attributable to poultry waste application to pastures is calculated at between 432,000 lb to nearly 500,000 lb annually based on poultry [phosphorus] application to the landscape and literature P loss coefficients." *Id.*

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<sup>7</sup> No employee of Dynamic Solutions has been identified by Plaintiffs as a potential trial witness in this matter. However, Dr. Scott Wells testified in his deposition that modeling work done by Dynamic Solutions was provided to him by the State of Oklahoma. He felt that the modeling work used outdated data, some of which was unreliable due to the sampling method used. Exh. 7 (Wells Depo.) at 111:25-112:23. Thus, he did not use the information. However, Dr. Wells did conduct a modeling study of Lake Tenkiller involving a hydrodynamic and water quality model, which presumably parallels the modeling work conducted by Dynamic Solutions. *See* Exh. 8, Expert Report of Scott Wells, p. 1; *see generally*, Exh. 9 (Welch Depo.) at 419:1-421:8. Therefore, any testimony provided by Mr. Derichsweiler which is based upon Dynamic Solutions' work would touch on the same subjects as opinion testimony provided by Dr. Wells.

The same is true with respect to Mr. Derichsweiler's opinions regarding the contribution of phosphorus from poultry litter to problems with using Lake Tenkiller as a source of drinking water, degradation of aesthetics of the waters of the IRW, and problems with dissolved oxygen. *See* Exh. 4 at 83:6-22. Drs. Cooke and Welch offer opinions regarding problems associated with using Lake Tenkiller as a source of drinking water, degradation of aesthetics of the waters of the IRW, including taste and odor issues, as well as the existence of low dissolved oxygen levels. Exh. 11, Expert Report of Eugene Welch and Dennis Cooke, at 3-4, 12-20, 36-45. With respect to Mr. Derichsweiler's opinion regarding the existence of elevated levels of phosphorus and microbial pathogens in the IRW, Drs. Cooke and Welch opine that total phosphorus in Lake Tenkiller is five times higher than the levels seen in Broken Bow Reservoir. *Id.*, at 2, 34-36. Dr. Christopher Teaf offers the opinion that both surface and groundwater in the IRW contain elevated levels of bacteria. Exh. 12, Expert Report of Christopher Teaf, at 12-14. The opinions offered by Mark Derichsweiler are clearly duplicative of testimony which will be directly offered by or incorporated into the testimony of other witnesses Plaintiffs have identified, including Dr. Dan Storm and their retained experts. As such, his opinion testimony is duplicative and should be excluded under Rule 403.<sup>8</sup>

#### IV. CONCLUSION

For the reasons stated herein, the Court should preclude the presentation of opinion testimony of Plaintiffs' non-retained experts.

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<sup>8</sup> Additionally, if they are found to be based on data connected to this case, then the testimony of Dr. Chaubey, Dr. Haggard, and Dr. Daniel will also be duplicative of opinions offered by Plaintiffs' retained experts. Each of them offer opinions regarding the condition of the waters of the IRW and the effect of land application of poultry litter thereon. Plaintiffs' retained experts Dr. Engel, Dr. Fisher, Dr. Teaf, Dr. Cooke, and Dr. Welch all offer similar opinions. Therefore, the opinions offered by Dr. Chaubey, Dr. Haggard, and Dr. Daniel should be excluded pursuant to Rule 403.

Respectfully submitted,

BY: /s/ Michael R. Bond

Michael R. Bond, *appearing pro hac vice*  
Erin Thompson, *appearing pro hac vice*  
Dustin R. Darst, *appearing pro hac vice*  
KUTAK ROCK LLP  
234 East Millsap Road, Suite 400  
Fayetteville, Arkansas 72703-4099  
(479) 973-4200 Telephone  
(479) 973-0007 Facsimile

-and-

Robert W. George, OBA #18562  
Bryan Burns, *appearing pro hac vice*  
TYSON FOODS, INC.  
2210 West Oaklawn Drive  
Springdale, Arkansas 72762  
(479) 290-4067 Telephone  
(479) 290-7967 Facsimile

-and-

Patrick M. Ryan, OBA # 7864  
Stephen L. Jantzen, OBA # 16247  
Paula M. Buchwald, OBA # 20464  
RYAN, WHALEY & COLDIRON, P.C.  
119 North Robinson, Suite 900  
Oklahoma City, Oklahoma 73102  
(405) 239-6040 Telephone  
(405) 239-6766 Facsimile

-and-

Jay T. Jorgensen, *appearing pro hac vice*  
Thomas C. Green, *appearing pro hac vice*  
Mark D. Hopson, *appearing pro hac vice*  
Gordon Todd, *appearing pro hac vice*  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005-1401  
(202) 736-8000 Telephone  
(202) 736-8711 Facsimile

Attorneys for Defendants Tyson Foods,  
Inc., Tyson Chicken, Inc., Tyson Poultry,  
Inc., and Cobb-Vantress, Inc.



BY: /s/ James M. Graves

(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)

Woodson W. Bassett III  
Gary V. Weeks  
James M. Graves  
K.C. Dupps Tucker  
Vince Chadick  
BASSETT LAW FIRM  
P.O. Box 3618  
Fayetteville, Arkansas 72702-3618  
Telephone: (479) 521-9996  
Facsimile: (479) 521-9600

-and-

Randall E. Rose, OBA #7753  
George W. Owens  
OWENS LAW FIRM, P.C.  
234 W. 13<sup>th</sup> Street  
Tulsa, Oklahoma 74119  
Telephone: (918) 587-0021  
Facsimile: (918) 587-6111

Attorneys for George's, Inc. and George's  
Farms, Inc.

BY: /s/ A. Scott McDaniel

(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)

A. Scott McDaniel, OBA #16460  
Nicole M. Longwell, OBA #18771  
Philip D. Hixon, OBA #19121  
MCDANIEL, HIXON, LONGWELL  
& ACORD, PLLC  
320 South Boston Ave., Ste. 700  
Tulsa, Oklahoma 74103  
Telephone: (918) 382-9200  
Facsimile: (918) 382-9282

-and-

Sherry P. Bartley  
MITCHELL, WILLIAMS, SELIG,  
GATES & WOODYARD, PLLC  
425 W. Capitol Avenue, Suite 1800  
Little Rock, Arkansas 72201  
Telephone: (501) 688-8800  
Facsimile: (501) 688-8807

Attorneys for Peterson Farms, Inc.

BY: /s/ John R. Elrod  
(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)

John R. Elrod  
Vicki Bronson, OBA #20574  
P. Joshua Wisley  
CONNER & WINTERS, L.L.P.  
211 East Dickson Street  
Fayetteville, Arkansas 72701  
Telephone: (479) 582-5711  
Facsimile: (479) 587-1426

-and-

Bruce W. Freeman  
D. Richard Funk  
CONNER & WINTERS, L.L.P.  
4000 One Williams Center  
Tulsa, Oklahoma 74172  
Telephone: (918) 586-5711  
Facsimile: (918) 586-8553

Attorneys for Simmons Foods, Inc.

BY: /s/ Robert P. Redemann  
(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)

Robert P. Redemann, OBA #7454  
PERRINE, MCGIVERN, REDEMANN, REID,  
BERRY & TAYLOR, P.L.L.C.  
Post Office Box 1710  
Tulsa, Oklahoma 74101-1710  
Telephone: (918) 382-1400  
Facsimile: (918) 382-1499



-and-

Robert E. Sanders  
Stephen Williams  
YOUNG WILLIAMS P.A.  
Post Office Box 23059  
Jackson, Mississippi 39225-3059  
Telephone: (601) 948-6100  
Facsimile: (601) 355-6136

Attorneys for Cal-Maine Farms, Inc. and  
Cal-Maine Foods, Inc.

BY: /s/ John H. Tucker

(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)

John H. Tucker, OBA #9110  
Theresa Noble Hill, OBA #19119  
RHODES, HIERONYMUS, JONES, TUCKER &  
GABLE, PLLC  
100 W. Fifth Street, Suite 400 (74103-4287)  
P.O. Box 21100  
Tulsa, Oklahoma 74121-1100  
Telephone: (918) 582-1173  
Facsimile: (918) 592-3390

-and-

Delmar R. Ehrich  
Bruce Jones  
Krisann C. Kleibacker Lee  
Todd P. Walker  
Melissa C. Collins  
FAEGRE & BENSON LLP  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402  
Telephone: (612) 766-7000  
Facsimile: (612) 766-1600

-and-

Dara D. Mann  
MCKENNA, LONG & ADLRIDGE, LLP  
303 Peachtree Street, NE  
Suite 5300  
Atlanta, Georgia 30308  
Telephone: (404) 527-8579  
Facsimile: (404) 527-8849

Attorneys for Cargill, Inc. and Cargill  
Turkey Production, LLC

### **CERTIFICATE OF SERVICE**

I certify that on the 5th day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General  
Kelly Hunter Burch, Assistant Attorney General

drew\_edmondson@oag.state.ok.us  
kelly\_burch@oag.state.ok.us

Douglas Allen Wilson  
Melvin David Riggs  
Richard T. Garren  
Sharon K. Weaver  
Robert Allen Nance  
Dorothy Sharon Gentry  
Joseph P. Lennart  
David P. Page  
RIGGS ABNEY NEAL TURPEN ORBISON & LEWIS

doug\_wilson@riggsabney.com  
driggs@riggsabney.com  
rgarren@riggsabney.com  
sweaver@riggsabney.com  
rnance@riggsabney.com  
sgentry@riggsabney.com  
jlennart@riggsabney.com  
dpage@riggsabney.com

Louis W. Bullock  
Robert M. Blakemore  
BULLOCK BULLOCK & BLAKEMORE, PLLC

lbullock@bullock-blakemore.com  
bblakemore@bullock-blakemore.com

Frederick C. Baker  
William H. Narwold  
Elizabeth C. Ward  
Elizabeth Claire Xidis  
Ingrid L. Moll  
Jonathan D. Orent  
Michael G. Rousseau  
Fidelma L. Fitzpatrick  
MOTLEY RICE, LLC  
**COUNSEL FOR PLAINTIFFS**

fbaker@motleyrice.com  
bnarwold@motleyrice.com  
lward@motleyrice.com  
cxidis@motleyrice.com  
imoll@motleyrice.com  
jorent@motleyrice.com  
mrousseau@motleyrice.com  
ffitzpatrick@motleyrice.com

A. Scott McDaniel  
Nicole Longwell  
Philip D. Hixon  
Craig A. Mirkes  
MCDANIEL HIXON LONGWELL & ACORD, PLLC

smcdaniel@mhla-law.com  
nlongwell@mhla-law.com  
phixon@mhla-law.com  
cmirkes@mhla-law.com

Sherry P. Bartley  
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC  
**COUNSEL FOR PETERSON FARMS, INC.**

sbartley@mwsqw.com

Robert P. Redemann  
David C. Senger  
PERRINE, MCGIVERN, REDEMANN, REID, BERRY & TAYLOR, PLLC

rredemann@pmrlaw.net  
dsenger@pmrlaw.net

Robert E. Sanders  
E. Stephen Williams  
YOUNG WILLIAMS P.A.  
**COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.**

rsanders@youngwilliams.com  
steve.williams@youngwilliams.com

George W. Owens  
Randall E. Rose  
THE OWENS LAW FIRM, P.C.

gwo@owenslawfirmnpc.com  
rer@owenslawfirmnpc.com

James M. Graves  
Gary V. Weeks  
Woody Bassett  
K.C. Dupps Tucker  
Earl Lee "Buddy" Chadick  
Vincent O. Chadick  
BASSETT LAW FIRM  
**COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.**

jgraves@bassettlawfirm.com  
gweeks@bassettlawfirm.com  
wbassett@bassettlawfirm.com  
kctucker@bassettlawfirm.com  
bchadick@bassettlawfirm.com  
vchadick@bassettlawfirm.com

John R. Elrod  
Vicki Bronson  
Bruce W. Freeman  
D. Richard Funk  
P. Joshua Wisley  
CONNER & WINTERS, PLLC  
**COUNSEL FOR SIMMONS FOODS, INC.**

jelrod@cwlaw.com  
vbronson@cwlaw.com  
bfreeman@cwlaw.com  
dfunk@cwlaw.com  
jwisley@cwlaw.com

John H. Tucker  
Colin H. Tucker  
Theresa Noble Hill  
Kerry R. Lewis  
Colin C. Deihl  
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

jtucker@rhodesokla.com  
chtucker@rhodesokla.com  
thill@rhodesokla.com  
klewiscourts@rhodesokla.com

Terry W. West  
THE WEST LAW FIRM

terry@thewestlawfirm.com

Delmar R. Ehrich  
Bruce Jones  
Krisann C. Kleibacker Lee  
Todd P. Walker  
Melissa C. Collins  
FAEGRE & BENSON LLP

dehrich@faegre.com  
bjones@faegre.com  
kklee@faegre.com  
twalker@faegre.com  
mcollins@faegre.com

Dara D. Mann  
MCKENNA, LONG & ADLRIDGE, LLP

dmann@mckennalong.com

**COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC**

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

Mr. J.D. Strong  
Secretary of the Environment  
State of Oklahoma  
3800 North Classen  
Oklahoma City, OK 73118

/s/ Michael R. Bond

Michael R. Bond